No. 92-290

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Frank J. Festa, Jr.,

Petitioner,

v.

State of N.J. Board of Public Utilities; Chrys Wilson, Secretary; Thomas Hansen, Principal Investigator; Harold Smith, Supervisor; State of N.J. Dept. of Environmental Protection Scott Weiner, Commissioner; Bruce S. Schwartz, Attorney at Law, Office of Regulatory Services,

Respondent.

PETITION FOR WRITE OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

(1) May the United States District Court devoid of jurisdiction over a case make a decision in favor of either party.

(2) Does the United States District Court have jurisdiction over actions involving violations of 18 U.S.C.A. Sec. 1962, 28 U.S.C.A. Sec. 1337, 18 U.S.C.A. Sec. 1951.

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IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

Frank J. Festa, Jr.,

Petitioner,

v.

State of N.J. et al,

Respondent.

PETITION FOR WRITE OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Petitioner, Frank J. Festa, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the district court.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition. The Order of the District Court for New Jersey appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeal's Opinion in this matter was filed on April 24, 1992. A timely Petition for Rehearing was filed on April 30, 1992. The Court of Appeal's denial of the Petition for Rehearing was issued on May 19, 1992. This Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution Amendment V

No person shall ..... be deprived of life, liberty, or property.....

18 U. S. C. A. Section 1951(b)(2)

The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U. S. C. A. Section 1962(b)

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C.A. 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorney's fee.

28 U. S. C. A. Section 1337

The district court shall have original jurisdiction of any civil action or proceeding arising under Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

STATEMENT OF THE CASE

The United States District Court has jurisdiction over actions involving violations of 18 U.S.C.A. Section 1962. That 28 U.S.C. Section 1337 invests the district court with jurisdiction over Acts of Congress regulating commerce or

protecting trade and commerce against restraint, applicable to the instant case. The use of the power of public office itself constituted the offense of extortion under the Hobbs Act, 18 U.S.C. Section 1951.

By Order dated, June 7, 1991 the Clerk of the district court extended defendant, Thomas Hansen and Harold Smith, time to answer, move or otherwise reply. Defendants Chrys Wilson, Scott A. Weiner, and Bruce S. Schwartz have not requested and weren't granted an extention of time to answer, consequently, are in default. The court below erred when it granted defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6), and then began to consider the merits of the matter, without, an answer being filed. The lower court found in its Memorandum Opinion September 4, 1991, "....plaintiff must show an attempt by the defendants to "arouse fear." 471 F.2d at 343; 689 F. Supp. at 472; U.S. v. Roea, 560 F.2d 149, 153 n.5 (3Cir. 1977), cert. denied, 434 U.S. 862."

The lower court applied the wrong standard to the issue. The following cases expressly held or recognized that an offense under the extortion provisions of the Hobbs Act may be committed even though the defendant does not generate in his victim a fear of personal injury or property damage. It is sufficient under the Act that the defendants instil in Festa a fear of economic loss. U.S. v. Sweeney, (CA 3 Cir. Pa 1959) 262 F.2d 272; U.S. v. Provenzano, (1964, CA 3 N.J.) 334 F.2d 678, Cert. den. 379 U.S. 947, 13 L.Ed.2d 544, 85 S. Ct. 440; U.S. v. Mazzei, 521 F.2d 639. Defendants-Appellees, themselves, have certified that the BPU unlawfully revoked Festa's certificate of Public Convenience and Necessity, SW No. 1701, on August 16, 1991, a racketeering enterprise injury. In Hobbs, the "under color of official right" part of the definition repeats the common law defenition of extortion, a crime which could only be committed by a public official.
18 U.S.C. Section 1951 (a), (b) (2,3);
U.S. v. Kenny, 462 F.2d 1205, 1229 (3 Cir), cert. den. 409 U.S. 914, 93 S. Ct. 233,

34 L.Ed.2d 176 (1972); U.S. v. Mazzei, 521 F.2d 639 (3 Cir. 1975); U.S. v. Crowley, 504 F.2d 992, 995 (7 Cir. 1974); U.S. v. Nedley, 255 F.2d 350, 355 (3 Cir. 1958); Cf. Martin v. U.S., 278 F. 913, 917 (2 Cir. 1922). The defendants prevented Festa from attaining formal or legal permission to opperate a solid waste business, after they could do no more to impede the process, granted Festa a license, then unlawfully revoked it by falsely claiming that he had not filed an annual report.

18 U.S.C. Section 1951; Fed. R. Crim. Proc. rule 7(c) (1); 18 U.S.C. Section 1962; U.S. Const. Amends. 5, 6. Petitioner argued before the Court of Appeals for the Third Circuit in his brief dated February 10, 1992, "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of subject matter, the action must be dismissed." Several cases have pointed out that a court devoid of jurisdiction over the case cannot make a decision in favor of either party. It can only dismiss the case for want of jurisdiction. New Orleans Mail Co. vs. Flanders (New Orleans & B. S. Mail Co. vs.

Fernandez) 12 Wall (US) 130, 20 L ed 249;
Cournand vs. Lucor Corp. (Fla App) 114 So 2d 733;
Moeller vs. Moeller, 175 Kan 848, 267 P2d 536;
Corbett vs. Boston & M. R. Co. 219 Mass 351,
107 NE 60, 12 ALR 683; State ex rel. Cowan vs.
District Court of First Judicial Dist. 131 Mont
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REASON FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: This petition presents issues resolved by this Court; and the Opinion below conflicts. with previous decisions of this Court, with its own decisions, and with decisions of other Circuits.

That a court lacks discretion to consider the merits of a case, when it found it is without jurisdiction over the subject matter.

Further, this Court has implicitly held:

That U.S.C.A. 18 Section 1962(c): It shall be unlawful for any person employed by or associated [illegible]h any enterprise engaged in, or the activities [illegible]affect, interstate or foreign commerce, [illegible]ticipate, directly or indirectly, [illegible]nterprise's affairs through a [illegible] [illegible]ctivity....

U.S.C.A. 18 Section 1951(b)(2): The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

U.S.C.A. 28 Section 1337: The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monoplies.

U.S.C.A. 18 Section(c): Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

If this Court should elect not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinion in Firestone Tire & Rubber Co. v Risjord (1981) 449 US 368; United States vs. Turkette 452 US 576; [illegible]ne vs. United States 361 US 212.

[illegible]itted,

Dated: August 7th, 1989

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 92-5024

FRANK J. FESTA, JR,

APPELLANT,

vs

STATE OF NEW JERSEY et al,

RESPONDENT.

Appeal from the United States District Court for the District of New Jersey D. C. Civil Action No. 91-01754

Submitted Under Third Circuit Rule 12(6)

April 16, 1992 Before: Becker, Alito and Garth, Circyit Judges

Judgment Order

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is AFFIRMEN.

Costs taxed against appellant.

April 24, 1992

APPENDIX A

Filed Sep. 4, 1991
Not for Publication

UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF NEW JERSEY

FRANK J. FESTA, JR., Civ. No. 91-1754

Plaintiff, ORDER

vs.

STATE OF N.J. et al.,

Defendants.

This matter having come before the court upon the motion of defendant to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b) (1) for lack of subject matter jurisdiction and to Fed. R. Civ. P. 12(b) (6) for failure to state a claim; and the court having considered the submission of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown; IT IS this 4 day of September, 1991, hereby ORDERED that defendants' motion to dismiss the Complaint for failure to state a claim and for lack of subject matter jurisdiction be and hereby is granted; and it is further ORDERED that the Complaint be and hereby is dismissed with prejudice.

APPENDIX B